No. 01-1541

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SAGE REALTY CORPORATION, THE WILLIAM KAUFMAN ORGANIZATION, LTD., 4 THIRD AVENUE FEE LLC, WATER STREET FEE LLC, 7 THIRD AVENUE FEE LLC, MADISON AVENUE FEE LLC, MADISON AVENUE LEASEHOLD LLC, 7 THIRD AVENUE LEASEHOLD LLC, 4 THIRD AVENUE LEASEHOLD LLC, WATER STREET LEASEHOLD LLC, MELVYN KAUFMAN and ROBERT KAUFMAN,

Petitioners,

—v.—

PROSKAUER ROSE LLP and
NOMURA SECURITIES INTERNATIONAL, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE FIRST DEPARTMENT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Should this Court deny the petition for a writ of *certiorari*, in which Petitioners assert that the Due Process Clause of the United States Constitution required an evidentiary hearing on a motion to dismiss Petitioners' complaint as a sanction for their willful destruction of relevant evidence they had an obligation to produce, where (1) Petitioners failed properly to raise in state court the federal constitutional issue on which review is sought, and (2) Petitioners have identified no conflict concerning federal due process requirements in the context of imposing sanctions for spoliation of evidence or even any cases addressing that issue?

TABLE OF CONTENTS

Page

RESPONDENT'S BRIEF IN OPPOSITION 1

JURISDICTION 1

COUNTER-STATEMENT OF THE CASE 1

A. Introduction. 1

B. Petitioners Willfully Destroyed Relevant Evidence They Had An Obligation To Produce. 2

C. The New York Supreme Court's Dismissal Of Virtually All Of Petitioners' Complaint Without Raising Or Deciding Any Due Process Argument 3

D. The First Department's Affirmance 4

E. The New York Supreme Court's Dismissal Of Petitioners' Remaining Conflict-Of-Interest Claim Without Raising Or Deciding Any Due Process Argument 5

F. The First Department's Second Affirmance 6

G. The New York Court of Appeals' Dismissal, Then Denial, Of Petitioners' Application For Leave To Appeal Without Considering Any Due Process Argument 6

REASONS WHY THE WRIT SHOULD BE DENIED ... 7

I. THE SUPREME COURT LACKS JURISDICTION TO REVIEW THE DECISION OF THE FIRST DEPARTMENT BECAUSE PETITIONERS' DUE PROCESS ARGUMENT WAS NEITHER PROPERLY PRESENTED TO NOR DECIDED BY THE NEW YORK COURTS. 7

A. The Absence Of Any Decision On Due Process Grounds By Any Of The New York Courts Below Presumptively Establishes That Petitioners Failed To Present A Federal Constitutional Issue In State Court. 7

B. Petitioners Have Not and Cannot Satisfy Their Burden Of Demonstrating That They Properly Presented Their Federal Due Process Claims To The New York Courts. . 9

II. THERE IS NO CONFLICT ON ANY PERTINENT ISSUE OF FEDERAL CONSTITUTIONAL LAW THAT REQUIRES THIS COURT'S REVIEW. . . 13

A. There Is No Split Of Authority Regarding When Due Process Requires An Evidentiary Hearing. 13

B. The "Adverse Inference" Doctrine Is Not Properly Before This Court And Does Not Present An Issue Of Federal Law. 14

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Adams v. Robertson,
520 U.S. 83 (1997) ..... *passim*

Cardinale v. Louisiana,
394 U.S. 437 (1969) 8

Cibro Petroleum Prods., Inc. v. Chu,
67 N.Y.2d 806 (1986) 10

Colton v. Riccobono,
67 N.Y.2d 571 (1986) 10

Kami & Sons, Inc. v. Pipe,
248 A.D.2d 312 (1st Dep't 1998) 10

Laird v. Tatum,
409 U.S. 824 (1972) 13

Lehigh Portland Cement Co. v. Town of Catskill,
263 A.D.2d 558 (3d Dep't 1999) 10

Microsoft v. United States,
530 U.S. 1301 (2000) 13

Miller v. Loewenberg,
75 A.D.2d 620 (2d Dep't 1980) 10

Silvestri v. General Motors Corp.,
271 F.3d 583 (4th Cir. 2001) 13

Webb v. Webb,
451 U.S. 493 (1981) ..... *passim*

West v. Goodyear Tire & Rubber Co.,
167 F.3d 776 (2d Cir. 1999) 14

STATUTES AND RULES

28 U.S.C. § 1257(a) 7, 14

N.Y. Const. Art. VI, § 2 13

N.Y. Jud. Law § 14 12

Rules Of The Chief Administrator Of The Courts
§ 100.3(E)(1)(d)(i) 12

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Proskauer Rose LLP, formerly Proskauer Rose Goetz & Mendelsohn LLP ("Proskauer"), respectfully submits this brief in opposition to the petition of Sage Realty Corporation and related parties (collectively, "Petitioners") for a writ of certiorari to review the decisions and orders of the Appellate Division Of The Supreme Court Of The State Of New York For The First Department (the "First Department") dated September 7, 2000 and June 21, 2001, which successively dismissed portions of Petitioners' complaint as a consequence of their willful destruction of relevant evidence.

JURISDICTION

This Court lacks jurisdiction under 28 U.S.C. § 1257(a). The state courts below did not consider the "validity of a statute of any State . . . on the ground of its being repugnant to the Constitution, treaties, or laws of the United States," and no claim of any "title, right, privilege, or immunity . . . under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States" was properly claimed or raised below.

COUNTER-STATEMENT OF THE CASE

A. Introduction.

On February 8, 1995, Petitioners closed a complex transaction in which they restructured ownership interests in four Manhattan office buildings, refinanced mortgages on those buildings, and received a new $174 million loan from an affiliate of Nomura Securities International ("NSI"). Proskauer represented Petitioners in this successful transaction, which closed on February 8, 1995.[1] More than two years later,

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[1] At the time of the underlying transaction, Proskauer was known as Proskauer Rose Goetz & Mendelsohn LLP.

Petitioners filed suit against Proskauer for alleged malpractice in connection with the transaction. Petitioners' central allegation was that Proskauer did not advise them that they mortgaged the fee interests (as opposed to the leasehold interests) in the four buildings as part of the transaction. Petitioners also alleged that they never knew of or authorized certain provisions, known as "defeasance provisions," for releasing mortgages and substituting collateral for those mortgages. Finally, Petitioners asserted that Proskauer had an undisclosed conflict of interest.

B. Petitioners Willfully Destroyed Relevant Evidence They Had An Obligation To Produce.

In July 1999, during discovery in the malpractice action, Petitioner Melvyn Kaufman knew that Proskauer was pressing a demand for production of tape recordings of telephone conversations between the parties and others who would be witnesses, all highly relevant to core issues in the lawsuit (*i.e.*, whether Proskauer told Petitioners, and/or Petitioners knew, about the fee mortgages and defeasance provisions). Mr. Kaufman produced a recording of only one telephone conversation with Proskauer contemporaneous with the transaction, although he had many more. Mr. Kaufman threw three or four additional tapes in an office trash receptacle, and took twenty more tapes home to destroy.

He admittedly destroyed these tapes to make certain no one would touch or recognize them, much less hear them, and then claimed they were irrelevant to the litigation. Mr. Kaufman initially told the New York Supreme Court ("the trial court") that he involved his attorneys and others in a diligent search for all relevant tapes before he destroyed them, but discovery established that he and his brother Robert conducted only the most cursory search, and that they did so secretively and alone. In fact, when Mr. Kaufman learned that one relevant recording had actually survived his concerted destruction of tapes, his

candid reaction was: "I don't even know where the hell that came from . . . ." Petitioners' Appendix ("Pet. App.") 6a.

C. The New York Supreme Court's Dismissal Of Virtually All Of Petitioners' Complaint Without Raising Or Deciding Any Due Process Argument

After "fully review[ing]" extensive evidence including the videotape of Mr. Kaufman's deposition, incontrovertibly establishing Mr. Kaufman's deliberate destruction of relevant evidence, and extensive affidavits and briefs, the trial court exercised its discretion pursuant to governing New York law, and ruled as follows:

> [T]he circumstances of Melvyn Kaufman taking tapes home with him and destroying [tapes] without even letting his attorneys listen to them on the heels of his selecting other tapes to give to his counsel to produce; his statement in [a] letter to Proskauer that it had forced him to discontinue the retention of recordings after defendants' demand for *relevant* recordings; his apparent surprise at his deposition that he had produced *any* recording which related to . . . a central issue in this case[]; and the no-less-than-three different, inconsistent and incredible explanations for when and how he disposed of tapes (which can only be described as a valiant attempt by his attorneys at damage control . . .) considered together, lead this court to draw 'negative inference' . . . and persuade this court that there has been a willful and bad faith destruction of discovery material that ought to have been disclosed. . . .

Pet. App. 15a-16a (emphasis in original, internal citations omitted). The trial court accordingly dismissed all of Petitioners' claims against Proskauer (except the alleged conflict of interest claim) and all of Petitioners' claims against

NSI. The trial court chided Petitioners for contending that Proskauer had not demonstrated that the tapes Petitioners destroyed were relevant, noting that such proof "is not possible here, where the tapes no longer exist due to plaintiffs' wrongdoing." Pet. App. 16a-17a.

Petitioners never argued to the trial court that the Due Process Clause mandated that the court conduct an evidentiary hearing before dismissing their claims. Accordingly, the trial court opinion did not discuss or decide that federal constitutional question.

D. The First Department's Affirmance

On September 7, 2000, the First Department unanimously affirmed, holding:

> Plaintiffs' main defense to dismissal, in fact to the imposition of any sanctions, is the conclusory claim that the tapes were not relevant to the underlying action and, as such, were not discoverable in the first place. The sheer effrontery of this claim, in view of Kaufman's intentional act of destroying the tapes once disclosure became imminent, is amazing. The likely relevance of the destroyed evidence is easily inferred.
>
> . . .
>
> We also conclude that the destruction of the tapes was done in bad faith, an inference also circumstantially supported by the nature of Kaufman's conduct and the timing. Again, the record clearly supports this conclusion. Evidence by former employees established that 'hundreds' of tapes were present in his office when this litigation commenced, and that they no longer existed during the time period the discovery dispute was occurring. Kaufman himself admitted taking home several tapes with the expressed intention of destroying them. . . .

> We have recognized that under such circumstances, dismissal may be appropriate as a matter of 'elemental fairness,' especially when the destruction of the evidence is 'reprehensible.'

Pet. App. 8a-10a (internal citations omitted).

On their appeal to the First Department, Petitioners never argued that the trial court's dismissal of virtually all of their complaint without an evidentiary hearing violated the Due Process Clause. Accordingly, the First Department opinion did not address or decide any federal due process right to an evidentiary hearing.

E. The New York Supreme Court's Dismissal Of Petitioners' Remaining Conflict-Of-Interest Claim Without Raising Or Deciding Any Due Process Argument

Once the trial court had dismissed most of Petitioners' claims due to their admitted destruction of relevant evidence, Petitioners were left with a fatally flawed complaint. The court had already dismissed all allegations reflecting any harm or injury Petitioners could possibly have suffered as a result of the alleged conflict of interest. Accordingly, faced with a complaint that alleged wrongdoing but no resulting injury, Proskauer successfully moved for summary judgment. The court held:

> If I were to permit plaintiffs to pursue their claim for damages based upon the alleged conflict of interest, they would effectively be dodging the impact of their bad faith spoliation, and doing an end-run around my prior determination, which has been affirmed. Such a result is not appropriate, as it would be incongruent with the prior findings regarding the proper penalty for willful spoliation of evidence.

Pet. App. 25a. Petitioners once again failed to assert any federal Due Process claim to the trial court before dismissal of the remaining claims in their complaint. The trial court's opinion accordingly did not discuss or decide any federal issue.

F. The First Department's Second Affirmance

By order dated June 21, 2001, the First Department affirmed dismissal of the conflict of interest claim. Reaffirming that Petitioners had engaged in the "bad faith destruction of evidence," the First Department held that, absent damages independent of Petitioners' now-dismissed malpractice claims, their conflict of interest allegations were not legally viable. *See* Pet. App. 22a. Petitioners again failed to argue in the First Department that the Due Process Clause required a hearing prior to dismissal of their claims, and, accordingly, the First Department once again made no reference to any federal due process issue.

G. The New York Court of Appeals' Dismissal, Then Denial, Of Petitioners' Application For Leave To Appeal Without Considering Any Due Process Argument

On Petitioners' motion to the New York Court of Appeals for leave to appeal, the Court of Appeals dismissed Petitioners' initial application on the grounds that "the order sought to be appealed from does not finally determine the action within the meaning of the [New York] Constitution." Pet. App. 27a. Upon Petitioners' renewed motion,[2] the Court of Appeals

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[2] In addition to dismissing most of plaintiffs' claims, the trial court's initial order awarded both NSI and Proskauer their attorneys' fees, as well as their "fees on fees" (representing the amount of money Proskauer and NSI spent to obtain their attorneys' fee awards). Although Petitioners stipulated to withdraw their appeal of the award of attorneys' fees and "fees on fees" as to NSI, they nonetheless

denied, without opinion, Petitioners' application for leave to appeal, in an order dated January 10, 2002. Pet. App. 29a.

It was only in connection with their attempts to seek leave to appeal to the Court of Appeals that Petitioners for the first time mentioned their perceived federal "due process" rights to an evidentiary hearing. As we show below, however, New York law prohibits a party from raising an issue for the first time on appeal to the Court of Appeals. Not surprisingly, the Court of Appeals therefore made no reference to "due process" or to any federal issue in its orders dismissing, then denying, leave to appeal.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE SUPREME COURT LACKS JURISDICTION TO REVIEW THE DECISION OF THE FIRST DEPARTMENT BECAUSE PETITIONERS' DUE PROCESS ARGUMENT WAS NEITHER PROPERLY PRESENTED TO NOR DECIDED BY THE NEW YORK COURTS.

A. The Absence Of Any Decision On Due Process Grounds By Any Of The New York Courts Below Presumptively Establishes That Petitioners Failed To Present A Federal Constitutional Issue In State Court.

The jurisdiction of this Court to review decisions of state courts is conferred by 28 U.S.C. §1257(a), which provides in pertinent part:

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appealed as to Proskauer, which precluded review by the Court of Appeals for want of a "final" appealable order. The First Department ultimately affirmed the award of attorneys' fees to Proskauer, but reversed the award of "fees on fees," thereby resolving the finality issue and prompting Petitioners' second motion for leave to appeal.

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any title, right, privilege, or immunity is *specially set up or claimed* under the Constitution . . . . [of] the United States.

Rule 14.1(g)(i) of this Court requires a party seeking review of a state court judgment to identify

> the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

With "very rare exceptions," Congress has limited this Court's jurisdiction over state court judgments to only federal claims that were "either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (dismissing writ as improvidently granted where petitioner failed to raise federal due process argument in Alabama Supreme Court) (internal punctuation omitted). "[T]he jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-97 (1981). *See also Cardinale v. Louisiana*, 394

U.S. 437, 438 (1969) ("the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions").

To enforce that limitation, this Court has repeatedly held that "[w]hen the highest state court is silent on a federal question before us, we assume that the issue was not properly presented . . . ." *Adams*, 520 U.S. at 86-87, *citing Board of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987). *See also Webb*, 451 U.S. at 495-96 ("when the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary"). The assumption that the Petition is not within this Court's jurisdiction is squarely applicable here, because none of the state court decisions below suggests that any federal question was ever presented or decided. *Adams*, 520 U.S. at 86-87; *Webb*, 451 U.S. at 495-96.

B. Petitioners Have Not and Cannot Satisfy Their Burden Of Demonstrating That They Properly Presented Their Federal Due Process Claims To The New York Courts.

Petitioners could overcome their presumptive failure to raise their federal claims in the New York courts only by carrying the "burden of . . . demonstrating that the state court had 'a fair opportunity to address the federal question that is sought to be presented'" to this Court. *Adams*, 520 U.S. at 87, *citing Webb*, 451 U.S. at 501. But they cannot do so, as they have not established "that the claim was raised at the time and in the manner required by the state law," or that "the state procedural requirements could not serve as an independent and adequate state law ground for the state court's judgment." *Id.* (internal citations and punctuation omitted).

Under New York law, an appellate court will not consider an argument that a party fails to raise in the first instance with the trial court. *See, e.g., Colton v. Riccobono*, 67 N.Y.2d 571, 575 (1986) (appellant's "argument was not presented below, and, accordingly, it is not preserved for appeal"); *Cibro Petroleum Prods. Inc. v. Chu*, 67 N.Y.2d 806, 809 (1986) ("[w]e have not considered the constitutional theories newly advanced before us and which plaintiff concedes were not argued to the courts below"); *Kami & Sons, Inc. v. Pipe*, 248 A.D.2d 312, 313 (1st Dep't 1998) (plaintiff's claim that it was denied due process "is improperly raised for the first time on appeal"); *Miller v. Loewenberg*, 75 A.D.2d 620 (2d Dep't 1980) ("[t]he claim that petitioner is entitled to a due process hearing . . . had not been previously raised and will not be considered for the first time on appeal").[3] Having failed to raise any due process claim both in the trial court and the First Department, Petitioners were not entitled to present it to the Court of Appeals, much less to insist that the Court of Appeals' denial of discretionary review operated as a substantive rejection of that claim.

Nor do the pages Petitioners cite from the trial court transcript (Pet. 6) adequately raise any federal claim below, for nowhere did Petitioners mention the words "hearing" or "due process." Even had Petitioners requested a hearing (which they did not), parties routinely request hearings as a matter of state practice or state constitutional law, and such a request in a state court lawsuit is not equivalent to the express assertion of a federal due process right. Without asserting a right to a hearing clearly rooting the right in the federal Constitution, and citing

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[3] Indeed, even if Petitioners had raised a federal issue in the trial court, which they did not, their "failure to raise an issue in [their] appellate brief is tantamount to abandonment or waiver of the issue." *Lehigh Portland Cement Co. v. Town of Catskill*, 263 A.D.2d 558, 560 (3d Dep't 1999).

applicable federal case law, Petitioners could not (and did not) adequately create a federal issue which this Court may review. *See, e.g., Adams*, 520 U.S. at 89 n.3 (even "the passing invocations of 'due process' we found [in Petitioners' Joint Appendix], fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment, but could have just as easily referred to the due process guarantee of the Alabama Constitution . . . and thus they did not meet our minimal requirement that it must be clear that a *federal* claim was presented") (emphasis in original); *Webb*, 451 U.S. at 496 (vague references to "full faith and credit" in state court proceedings did not satisfy requirements of Supreme Court where "nowhere did she cite to the Federal Constitution or to any cases relying on the Full Faith and Credit Clause of the Federal Constitution"). *A fortiori*, even had Petitioners requested a hearing — without arguing that a hearing is required by the federal Due Process Clause, or that dismissal absent a hearing would violate the Fourteenth Amendment — their request would have been insufficient to vest this Court with jurisdiction.[4]

Petitioners stand in a far weaker position than the *Adams* petitioners, who were denied review on jurisdictional grounds, as Petitioners here never referred to "due process" (much less to the Fourteenth Amendment) in either the trial court or the First Department at all, although the argument was theoretically

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[4] Indeed, Petitioners never clearly presented *any* claim that they were entitled to a hearing, and they misstate the record in asserting that "the New York supreme court explicitly held" that they were not entitled to one. *See* Pet. 8, 18. The trial court did not hold that Petitioners were not entitled to a hearing. The trial court held that because Petitioners themselves had destroyed the tape recordings at issue, they could not complain that Proskauer had not established the materiality of those recordings. *See* Pet. App. 16a-17a.

ripe for the making in the trial court. *Adams*, 520 U.S. at 89 n.3.

Having failed to assert in any way in the trial court or the First Department that the United States Constitution required a hearing prior to dismissal of their claims on spoliation grounds (or that the Constitution would be violated absent such a hearing), Petitioners failed properly and adequately to raise, with "fair precision and in due time," in state court the federal question they now ask this Court to consider. *Adams*, 520 U.S. at 87-88 (Petitioners had "done nothing" to demonstrate why their failure to satisfy Alabama state procedural rules for raising due process argument "would not be an adequate and independent ground for the state court to disregard the claim"); *Webb*, 451 U.S. at 495-96 ("when the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary").[5]

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[5] Without including it in the questions presented, footnote 4 of the petition identifies as a "separate due process violation" an argument that Petitioners were "unfairly disadvantaged" by the recusal of Chief Judge Kaye, whose husband, Stephen Rackow Kaye, is a litigation partner at Proskauer, the Respondent. That issue was never presented to the Court of Appeals. Moreover, the recusal of the Chief Judge, pursuant to New York law and consistent with the Canons of Judicial Ethics and longstanding practice, raises no substantial federal due process question. *See, e.g.*, N.Y. Jud. Law § 14; Rules Of The Chief Administrator Of The Courts § 100.3(E)(1)(d)(i) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including . . . where . . . the judge knows that the . . . judge's spouse . . . is a party to the proceeding . . . [or] has an interest that could be substantially affected by the proceeding.").

Thus, Chief Judge Kaye was required to disqualify herself

II. THERE IS NO CONFLICT ON ANY PERTINENT ISSUE OF FEDERAL CONSTITUTIONAL LAW THAT REQUIRES THIS COURT'S REVIEW.

Petitioners' attempt to fabricate a purportedly "well-developed conflict among the circuit courts of appeals and the state courts of last resort" (Pet. 16) as to whether federal due process requires an evidentiary hearing before dismissal for willful destruction of evidence is entirely without merit. There is no conflict to resolve at all. As we demonstrate below, no case Petitioners cite with respect to this perceived "conflict" of authority even addresses any federal constitutional due process issue in the spoliation context.

A. There Is No Split Of Authority Regarding When Due Process Requires An Evidentiary Hearing.

Despite Petitioners' citation of extensive caselaw from various state and federal courts (*see* Pet. 17-18), in *none* of the decisions Petitioners cite did any court discuss (let alone decide) whether the Due Process Clause of the United States Constitution required an evidentiary hearing prior to dismissal of a complaint for spoliation. Indeed, while some courts have

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since her spouse is a party to this proceeding as a partner of Respondent and for the same reason has an interest that could be substantially affected by the proceeding. Indeed, it certainly would have been unfair and might have been a denial of due process, had she not recused herself. Moreover, in the event of a deadlock or lack of quorum (five judges) in the Court of Appeals, there is a procedure under New York law for substitution of one or more recused judges by appointment of one or more Appellate Division Justices for the case or cases involved, a procedure which, while infrequently invoked, has been used from time to time when necessary. *See, e.g.*, N.Y. Const. Art. VI, § 2. *Microsoft v. United States*, 530 U.S. 1301 (2000) and *Laird v. Tatum*, 409 U.S. 824 (1972), which petitioners cite, are wholly inapposite.

dismissed complaints without discussing whether a hearing was appropriate, *see, e.g., Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001), and other courts have indicated that a hearing took place, *see, e.g., West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776 (2d Cir. 1999), there is simply no discussion — and therefore no conflicting resolution — of the federal constitutional question whether the Due Process Clause *requires* such a hearing.

Similarly unavailing is Petitioners' invocation of decisions from numerous state courts, *see* Pet. Br. 17-18, none of which addressed issues of *federal* constitutional law under the Due Process Clause. All involved questions of state law insufficient to support this Court's jurisdiction. *See* 28 U.S.C. § 1257(a); *Adams*, 520 U.S. at 89 n.3 (petitioners must "meet our minimal requirement that it must be clear that a *federal* claim was presented") (emphasis in original).

B. The "Adverse Inference" Doctrine Is Not Properly Before This Court And Does Not Present An Issue Of Federal Law.

Nor should the writ issue to clarify the purportedly "confusing state of the law relating to the adverse inference, which is frequently used as a remedy on spoliation motions." *See* Pet. 21. Petitioners contend that "there is no clear statement of the law regarding the adverse inference. . . " (Pet. 23), but a state law issue in a state law case presents no occasion for the Court to address the issue.

On the facts of this case, what Petitioners call the "adverse inference" doctrine implicates no question of federal constitutional law. *See* 28 U.S.C. § 1257(a); *Adams*, 520 U.S. at 89 n.3 (petitioners must "meet our minimal requirement that it must be clear that a *federal* claim was presented") (emphasis in original). None of the cases Petitioners cite discusses (let alone decides) how the Due Process Clause of the United States

Constitution relates to "when the adverse influence applies, what conduct triggers the use of the inference, or whether the court or the jury should determine the disputed facts." *See* Pet. 23.

Even assuming *arguendo* that application of the "adverse inference" doctrine raises an issue of federal constitutional law (which it does not), the First Department did not pass on any such issue, and Petitioners failed to raise it timely below, and this Court is therefore without jurisdiction to consider it now. *See, e.g., Adams*, 520 U.S. at 86-87 ("[w]hen the highest state court is silent on a federal question before us, we assume that the issue was not properly presented . . . .").

CONCLUSION

For each of these reasons, this Court should deny the petition for a writ of *certiorari*.

Respectfully submitted,

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